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In the Supreme Court of the United States

October Term, 1928

No. 96

The State Highway Commission of Wyoming, consisting of Hyram Lingle, T. D. O'Neil, S. W. Conwell, J. M. Snyder and Roy Seney,
Petitioner,

vs.

Utah Construction Company, a corporation,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Brief of Respondent

JOHN W. LACEY,
HERBERT LACEY,
W. L. WALLS,
BENJAMIN S. CROW,
Counsel for Respondent.

(33,304)

LEGAL PRINTING CO., SALT LAKE CITY

SUBJECT INDEX.

	Page
STATEMENT OF CASES	1, 3
History of Litigation	1, 3
Ground of Jurisdiction	3
SUMMARY OF THE ARGUMENT:	
1. The Commission is a quasi corporation body	3, 4
Argument on above point	14, 19
2. Quasi corporate bodies, even though but local arms or agencies of the state, as in the case of counties, are recognized as having a citizenship separate from that of the state within the intent of Section 24 of the Judicial Code	4
Argument on above point	19, 20
3. If not a quasi corporate body the Commission is, nevertheless, a legal entity consisting of a collective body of individuals, and derives a citizenship from the citizenship of the members	4
Argument on above point	20 21
4. The contract is not a contract which by its terms is a contract between plaintiff and the state	4, 5
Argument on above point	21, 26
5. In deciding whether the state is the real party defendant, we are not governed by the rule applying the Eleventh Amendment to the Federal Constitution since in so far as the state's interest and rights are affected by this litigation it has waived its immunity from suit by consenting that the Commission may sue and be sued. The rule applying the Eleventh Amendment is liberal with the view of protecting the state's immunity from suit. But the rule with respect to diversity of citizenship under Section 24 of the Judicial Code is liberal with the view of upholding the court's jurisdiction. Parties to the record, standing in a representative capacity, stand upon their own citizenship	5, 6
Argument on above point	26, 28
6. The fact that the Commission is a mere agency, or arm, of the state, formed to perform a business or a governmental function, does not prevent its suing or being sued in its own right and name, if it is a legal entity	6, 7
Argument on above point	28, 39

Page

7. That the Commission has no funds or property out of which to satisfy a judgment, if such be the fact, does not make the Commission any the less the real party defendant 7

Argument on above point 39, 42

8. But the Commission has, or may have, property; and the so called State Highway fund is not a strictly state fund but is a State Highway Commission fund, subject to the disposal of the Commission and set apart for it 7

Argument on above point 42, 46

9. Wyoming state decisions construing the statute in question, if they do construe it, are not binding upon the federal court because the contract and rights of the plaintiff originated prior to such state decisions 7, 8

Argument on above point 46, 47

10. On matters involving its jurisdiction, a federal court is not bound by decisions of a state court, but will exercise its independent judgment 8

Argument on above point 48

11. Having established the Commission as a body in its nature suable, the Legislature of Wyoming could not by its amendment to Section 3025 of the Statute restrict jurisdiction to its own courts and thus abridge the jurisdiction of the federal courts.. 8

Argument on above point 48

12. In so far as the state's interests are affected by this action, and in so far as it is represented by the Commission, the state waived its immunity by the Commission's voluntary appearance in the action and contesting the same on the merits. The state legislature could not revoke jurisdiction in the Federal Court after having thus submitted to it 8

Argument on above point 48, 50

13. Federal cases cited in petitioner's brief are cases in which the Eleventh Amendment was invoked and in which the direct object of the suit was to deprive the state of its property or compel performance of some political function by state officers. They have no application to this action..... 9

Argument on above point 50, 52

14. State decisions in petitioner's brief are distinguishable on the facts or are expressions of an over-zealous emphasis by state courts of the state's sovereignty and exemption from suits 9

Argument on above point 52, 56

Page

15. The constitutional amendment of Wyoming sheds no light on the nature of the Commission .....

Argument on above point 56, 58

ARGUMENT: 9, 58

(a) Analysis of the statute creating the Commission 9, 14

(c) Conclusion 58

(b) See Summary of Argument for points discussed

APPENDIX: 59, 69

In the Supreme Court of the United States

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No. 33,304

The State Highway Commission of Wyoming, consisting of Hyram Lingle, T. D. O'Neil, S. W. Conwell, J. M. Snyder and Roy Seney,
Petitioner,

vs.

Utah Construction Company, a corporation,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Brief of Respondent

STATEMENT OF THE CASE

History of the Litigation.

Utah Construction Company, a corporation of the State of Utah, (sometimes referred to hereafter as "plaintiff"), commenced this action in the United States District Court for the District of Wyoming against the State Highway Commission of Wyoming, (referred to hereafter as "the Commission") for damages arising out of the breach of a construction contract made June 1st, 1922, under which

the plaintiff had undertaken to build and had thereafter built a portion of the so-called Wind River or Big Horn Canyon Highway in Wyoming (Tr. 1-78).

Jurisdiction of the court was invoked on the ground of diverse citizenship of the parties under Sec. 24 of the Judicial Code (U. S. Code, Sec. 41, Subd. 1, (See Appendix p. 59) it being alleged that the plaintiff is a citizen of Utah and the Commission and its individual members are citizens of Wyoming and the jurisditional amount was present (Tr. 3). A demurrer to plaintiffs second amended petition was filed by the Commission on August 26, 1925, first challenging the jurisdiction of the court on the ground that the State of Wyoming was the real party defendant, and second demurring generally as to the cause of action. (Tr. 78). This demurrer was overruled on October 16, 1925 (Tr. 79); the opinion of the District Court made in support of the order overruling the demurrer is found on page 104 and following of the transcript of record.

The Commission on November 14, 1925, filed its answer to the second amended petition (Tr. 79-93), to which plaintiff on January 14, 1926, made its reply (Tr. 93-99). On November 6, 1926, the Commission demurred to the reply, again challenging the jurisdiction of the court on the ground that the State was the party defendant and also demurring generally to the reply and re-asserting its demurrer to the second amended petition (Tr. 10).

The District Court, after a re-argument of the question of jurisdiction presented by this latter demurrer, changed its ruling, and on December 4, 1926, made its order sustaining the demurrers and entered its judgment dismissing the case (Tr. 100), holding that the State was in effect the party defendant and, since the state itself was not a citizen within the meaning of Section 24 of the Judicial Code the requisite diversity of citizenship did not appear.

The opinion of the District Court sustaining the demurrer is found on pages 115 to 124 of the transcript of record and is reported in 16 Fed. (2d) 322. For review of the judgment of dismissal thus entered the plaintiff, by writ of error brought the case to the Circuit Court of Appeals for the Eighth Circuit, which court, under date of December 21, 1927, reversed the District Court's ruling with directions that the judgment dismissing the case be set aside (Tr. 141-142). The opinion of the Circuit Court of Appeals is contained in the transcript of record at pages 126-137, with a dissenting opinion of Judge Scott found at pages 137-141 thereof. The opinion of the Circuit Court of Appeals is reported in 23 Fed. (2d.) page 638.

The case comes before this court on writ of certiorari (Tr. 142).

Ground of Jurisdiction.

As noted, jurisdiction was invoked by plaintiff on the ground of diverse citizenship of the parties under Section 24 of the Judicial Code, there being the jurisdictional amount involved. The State Highway Commission of Wyoming, it was contended, is a juristic entity, created by Chap. 132 of the Laws of Wyoming of 1919; Wyoming Compiled Stat. 1920, Chap. 186 (See Appendix p. 57) It has attributes and functions which for the purpose of suit distinguish it from the State of Wyoming. It is a citizen within the intent of Sec. 24 of the Judicial Code and appears on the record as, and is in fact, the real party defendant.

SUMMARY OF THE ARGUMENT.

The cases cited on the points enumerated in the succeeding summary are believed to uphold the view above expressed and to sustain the jurisdiction of the District Court.

1. The Commission is a quasi corporate body.

Butterfield v. State Industrial Accident Commission 111 *Ore.* 149, 223 *Pac.* 941;

Bromwell B. & W. G. Co., v. State Board of Charities and Corrections, 279 *Fed.* 440;

Larned v. Briscoe et al, 62 *Mich,* 393, 29 *N. W.* 22;

State v. Board of Health, 23 *Atl.* 949 (*N. J.* 1892);

Dunn v. University of Oregon, 9 *Ore.* 357;

Hancock v. Louisville & N. R. Co., 145 *U. S.* 409, 36 *L. Ed.* 755;

Levy Court v. Woodward, 2 *Wall.* 501; 17 *L. Ed.* 851;

Gross v. Kentucky Board of Managers, 105 *Ky.* 840;

14 *Corpus Juris, p.* 76.

2. Quasi corporate bodies, even though but local arms or agencies of the state government as in the case of Counties, (*Board of Comrs. of Laramie Co. v. Board of Commissioners of Albany and Carbon Counties,* 92 *U. S.* 307), are universally recognized as having an individuality separate from that of the state and a citizenship within the intent of Section 24 of the Judicial Code.

Lincoln County v. Luning, 133 *U. S.* 529;

Chicot County v. Sherwood, 148 *U. S.* 529.

3. If not a quasi corporate body, the State Highway Commission of Wyoming is still a legal entity; it is a collective body of individuals and derives a citizenship from the citizenship of its members.

Thomas v. Ohio State University, 195 *U. S.* 207, 49 *L. Ed.* 160.

4. The contract for the breach of which this action was commenced is not, as contended, a contract which *by its terms* is a contract between the plaintiff and the state. Authority is given to the commission by the statute creating it to make contracts in its own name both for state construction and county construction; it has no authority

to contract in any other name (Wyoming Comp. Stat. 1920, Chap. 186). It will be presumed to have contracted in an authorized manner.

Sloan Shipyard Co. v. U. S. Shipping Bd. and E. F. Corp. 215 *U. S.* 549 *at* 563.

The recital that it acts in a representative capacity will not operate to bind any other than itself.

State of Ohio v. Swift and Co. 270 *Fed.* 141.

The contract moreover has abundant internal evidence that the Commission, in its own name, was the contracting party, and a supplemental agreement between the plaintiff and the Commission, thereafter made, recites that the main contract was made between the plaintiff and the Commission (Tr. 75-77).

5. Whether the state is the real party defendant to this action should not be controlled, as assumed in petitioner's brief, by the rule laid down for ascertaining the application of the Eleventh Amendment to the Federal Constitution. In so far as the State's interests are effected by this litigation, it has waived its immunity by consenting that the suit may be brought, i. e., that the Commission may sue and be sued. The Eleventh Amendment was enacted in response to the public clamor over the decision of the Supreme Court in Chisolm v. Georgia. *Hans v. Louisiana,* 134 *U. S.* 1 *at* 10-17. The Amendment has therefore been given a liberal construction with the view of protecting the State's immunity from suit.

Regan v. Farmers Loan and Trust Company, 154 *U. S.* 362.

But Section 24 of the Judicial Code has been given a broad and liberal construction with a view of upholding the court's jurisdiction. Those acting in a representative

capacity, when authorized to sue or be sued, stand upon their own citizenship irrespective of the citizenship of the persons they represent, whose rights or property are involved.

Mexican Central R. Co. v. Eckman, 187 *U. S.* 427.

The citizenship of the parties to the record govern.

Childress v. Emory, 8 *Wheat.* 642, 669;
Rice v. Houston, 13 *Wall.* 66;
Blake v. McKim, 103 *U. S.* 336;
Smith v. Radkliffe, 87 *Fed.* 964;
Coal and Iron Co. v. Rehard, 204 *Fed.* 859;
Brisden v. Chamberlain, 53 *Fed.* 307;
Susquehanna & W. Va. Ry. and Coal Co. v. Blachford, 11 *Wall*, 172;

6. The fact that the Commission is a mere agency, or arm, of the State formed to perform a business, or a governmental, function, does not prevent its suing or being sued in its own right and name, if it is a legal entity.

Hopkins v. Clempson Agricultural College of South Carolina, 221 *U. S.* 636;
Port of Seattle v. O. W. R. R. Co., 255 *U. S.* 56;
Pearl River County v. Wyatt Lumber Co., 270 *Fed.* 26;
Parks v. Carriere Cons. School Dist., 12 *Fed.* (2d) 37;
Sloan Shipyards Corp. v. U. S. Shipping Board Emergency Fleet Corporation, 258 *U. S.* 549;
Board of Levee Comrs. v. Hulse, 17 *Fed.* (2d) 785;
Carmichael v. Anderson, 14 *Fed.* (2d) 166;
Butterfield v. State Commission, 111 *Ore.* 149;
Thompkins v. Kanawha Board, 19 *W. Va.* 264;
Gross v. Kentucky Board of Managers, 105 *Ky.* 840;
Bromwell Co. v. State Board, 279 *Fed.* 440;
Kelley v. Board of Public Works, 25 *Gratt* (*Va.*) 755;

County Board of Education v. State Board of Education, 106 *N. C.* 81;

Board of Trustees of Un. of Ill., v. Bruner, 51 *N. E.* 687 (*Ill.* 1898);

Reliance Mfg. Co., v. Board of Prison Comr's., 170 *S. W.* 941 (*Ky.* 1914);

Dunn v. University of Oregon, 9 *Ore.* 357.

7. That the Commission has no funds or property out of which a judgment rendered against it may be satisfied, if such be the fact, does not render the Commission any the less a party to the action, which it must defend in its own right where suit against it in its own name is expressly authorized. If there are no funds or property of the Commission which can be reached it will be presumed that the legislature which authorized it to be sued, will eventually supply it with funds to satisfy any judgments rendered against it.

Ward v. Board of Regents, 138 *Fed.* 372;

Hopkins v. Clempson Agriculture College, 221 *U. S.* 636;

Phoenix Lumber Co. v. Regents of the University of Idaho, 197 *Fed.* 425.

8. But the Commission has, or may have, property out of which the judgment may be defrayed. Also, the so-called State Highway fund is not strictly a state fund. It is subject to the disposal of the Commission and is set apart for it. It is derived partly from County sources and is a financial asset of the Commission alone.

Butterfield v. State Commission, 11 *Ore.* 149;

Port of Seattle v. O. W. R. R. Co., 255 *U. S.* 56;

Pearl River County v. Wyatt Lumber Co. 270 *Fed.* 26.

9. Decisions of the Supreme Court of Wyoming construing a state statute are not binding on the Federal

Courts where the contract or rights sought to be effected thereby originated prior to such state decisions.

Burgess v. Seligman, 107 *U. S.* 123, 133;
Kuhn v. Fairmont Coal Co., 215 *U. S.* 349, 360;
25 *Corpus Juris, p.* 843.

10. On matters involving its jurisdiction a federal court is not bound by decisions of a state court, but will exercise its independent judgment.

Mechanical Appliance Co. v. Castleman, 215 *U. S.* 437;
Southern Photo. Material Co. v. Eastman Kodak Co., 224 *Fed.* 523;
Thomas v. Trustees of Ohio State University, 195 *U. S.* 207.

11. Having established the Commission as a body in its nature suable the legislature of Wyoming could not, by its amendment to section 3025 of the statute, restrict jurisdiction to its own courts and thus abridge the jurisdiction of the federal courts.

Chicot County v. Sherwood, 148 *U. S.* 529;
Barrow v. Kane, 169 *U. S.* 517.

12. In so far as the state's interests are effected by the action and in so far as it is represented by the Commission, the State waived its immunity by the Commission's voluntary appearance in the action, by filing its general demurrer and its answer on the merits.

Clark v. Barnard, 108 *U. S.* 436.

Having tthus submitted to the jurisdiction the State could not revoke jurisdiction in the Federal Court, over which it has no control, by changing the statute. State decisions with respect to jurisdiction in state courts have no application, since the revocation of consent served also to revoke jurisdiction in the state court.

13. Federal cases cited in petitioner's brief holding that the state is a party to the action are cases in which the Eleventh Amendment was invoked and in which the direct object of the suit was to deprive the state of its property, effect its property interests, or compel the performance of some political function by a state officer. These cases have no application to an action, like the present, in which the object is merely to secure a judgment against a suable body, and no attempt is made to charge the state with liability or to effect its interest except as the state may be ultimately interested in an action brought against one of its creatures created by it for the performance of a business or governmental purpose.

14. Decisions of state courts cited in petitioner's brief holding that the suits reviewed are against the state are in the main expressions of the attitude of state courts in over-zealously emphasizing the state's sovereignity and exemption from suits in its own courts.

15. The Wyoming Constitutional Amendment did not create the Commission; it does not affect its purpose or control its nature.

ARGUMENT.

The decisions of the jurisdictional question involved require at the outset an examination of Chap. 186 of the Wyoming Compiled Statutes of 1920; Chapter 132 of the Laws of Wyoming of 1919. This statute is set out in the appendix at pages 57-64, and is summarized in the opinion of the Circuit Court of Appeals at pages 126-129 of the transcript of record. Reading this statute from beginning to end we note that whereas it purports to create a "State Highway Department" the State Highway Commission created thereby is endowed with certain peculiar attributes which distinguish it from a real department of

state. It is apparently an organization, created for the construction of state and county highways, the planning of highways for towns and municipal bodies, and the entering into contracts with individuals for such part of highway construction as it does not construct directly. In the performance of its business it proceeds, not in the name of the state but in its own name and on its own authority, and the interest which it represents is not alone the interest of the state but the interest of the counties whose highways may be constructed in part by it, and it roughly represents certain territorially defined highway districts. The statute provides:

"The Commission shall have the power to sue in the name of the State Highway Commission of Wyoming and may be sued by such name in any court upon any contract executed by it." (Sec. 3025). "All road and bridge construction work *any part of the cost of which is paid from the State Highway fund,* shall be performed according to plans prepared by the State Highway Superintendent and approved by the Commission and shall be performed by or under contracts awarded by the Commission." (Sec. 3027).

Contracts for construction costing more than Two Thousand Dollars shall be *awarded* to the lowest responsible bidder, but "Improvements costing less than Two Thousand Dollars may be constructed by the Commission on force account" (Sec. 3027). The Commission shall have the power to designate public highways as state highways and incorporate county roads into state highways (Sec. 3028). State highways shall be constructed at the expense of the state (Sec. 3029), but the Commission may co-operate with the respective counties of the state in the construction of county roads and bridges and such co-operative work shall be performed under the control and supervision of the Commission and in accordance with plans prepared by

the State Superintendent and shall not be commenced until the county "shall have entered into an agreement with the Commission to pay not less than one-half of the total cost to the state of such work and to pay the entire cost of maintaining the said highway thereafter." (Sec. 3030). This latter provision clearly gives the Commission authority to construct county roads to be owned and maintained by the county; this is the performance of a county as distinguished from a strictly state work.

The Commission is authorized to enter into agreement with the United States relating to the construction and maintenance of roads under the so-called Federal Aid Act. Such co-operative agreements may be for the construction or improvement of either a state highway or a county road. If the highway so to be constructed or improved is a county highway "the state's shares of the cost of such work shall be divided between the state and the county upon such basis as the Commission shall determine" and the county must furnish the right of way and enter into an agreement with the Commission whereby it shall agree to pay its share of such cost and to pay the cost of all subsequent maintenance work which shall be performed by and under the supervision of the State Highway Superintendent, and the county also shall pay into the State Highway fund its share of the estimated cost of such construction. (Sec. 3031).

In securing the necessary rights of way for such portions of highways as shall be designated as state highways the Commission may acquire the same by purchase or gift, or if necessary may acquire the same "by condemnation proceedings in the same manner as is provided by law for the condemnation of rights of way for railroad purposes" (Sec. 3028). In-as-much as it is maintained that the Commission is the *alter ego* of the state this latter provision is quite significient, for at the time of the enactment of the

statute creating the Commission the State by statute was already vested with the right to condemn rights of way in the same manner provided by law for the condemnation of rights of way for railroad purposes; *Section* 4893 *of the Wyoming Compiled Statutes* 1920 provided that "the state, the counties and each municipal corporation shall have power to purchase or acquire, by condemnation, any real estate, including streets, alleys or public highways * * * which power of condemnation shall be exercised in the manner prescribed by law for the condemnation of real estate by railroad companies" (see appendix p. 66). If the Commission be in fact the State, acting directly in the state's right, why should the legislature, having provided for the exercise of the right of eminent domain by the state in a particular manner, expressly grant the Commission the power to exercise this right in the same manner.

The manner in which the Commission is constituted is in itself significant. Its members are appointed as representatives of certain districts, each district comprising a separate territorial area (Sec. 3025). That these districts are in fact roughly defined highway districts is seen by a subsequent provision that seventy-five per cent of the amount appropriated to the State Highway fund "after the payment of overhead expenses, shall be apportioned to and spent in each Commissioner's district in proportion to the assessed valuation of each district by the last general assessment." (Sec. 3035).

"The Commission shall have a seal bearing the words 'State Highway Commission of Wyoming official seal' and copies of records in the office of the Commission certified by the Secretary of the Commission of such seal shall have prima facie varity." (Sec. 3025).

The Attorney General shall be the legal advisor of the Commission "and shall prosecute and defend all actions and appear in all proceedings in any federal department

in which the Commission shall be a party or be interested" (Sec. 3025). At the time of the enactment of this statute the laws of Wyoming already provided that "the Attorney General shall prosecute and defend all suits which may be instituted by or against the State of Wyoming, the prosecution and defense of which is not otherwise provided for by law * * * he shall be required to attend the interests of the state in all suits, actions or claims in which the state is or may become interested in either the Supreme Court of the state, or in any of the United States courts. He shall be the legal advisor of all elective and appointive state officials" (Wyoming Compiled Stat. 1920, Sec. 154. See Appendix p. 68).

For the uses of the Commission there is created a fund known as the state highway fund. It shall be in charge of the state treasurer and is composed of moneys appropriated by the legislature and moneys received from the United States under co-operative agreements, moneys derived from taxes for such fund or received from the sale of state bonds for highway construction or improvement, *moneys received from counties under co-operative agreements* and all other moneys received from donations or bequests which may be accepted by the Commission on behalf of the State of Wyoming, or from any other source designated by law for that purpose. The money in said fund shall be available to the Commission without further appropriation and no warrant shall be drawn thereon except on vouchers approved by the State Highway Superintendent. (Sec. 3034). Balances remaining in said fund at the close of any annual or biennial period shall not revert to the general fund, but shall remain in the state highway fund and be subject to subsequent expenditure under this chapter (Sec. 3035).

The combined force of these provisions indicates the creation of a body for the purpose of performing a business function in the interest of state, counties and munici-

palities and having power to contract in the interest of states and counties. While the statute does not expressly state that its contracts must be made in its own name, this is the obvious implication; it has the power to *award* "contracts; it has the power to construct roads on 'force account'"; it may contract for the building of highways, parts of which are owned and maintained by the counties. The body thus created is roughly representative of designated highway districts. It can sue and be sued in its own name. It has a seal, as distinguished from the seal of the state in the charge of the Secretary of State. It can condemn rights of way. It is a perpetual body. It operates as a unit and through the collective action of its members. It is given various powers which the state, acting in its own interests, already possessed.

1. The State Highway Commission of Wyoming, thus created, is a quasi corporate body. When designated as a branch of a "department of the state" it is misnamed. Its combined powers and the obvious purpose of its creation is consistent only with the formation of a legal entity, or juristic creature, with quasi corporate powers and functions.

In support of this proposition we cite the authorities set out in sub-division One of the Summary, calling attention to the following cases as illustrative of the point:

In Butterfield v. State Industrial Accident Commission, 223 *Pac.* 941, the Supreme Court of Oregon, considering the nature of a similar commission and its relation to the state, uses the following language:

> "It is the contention of the attorney general that the State Industrial Accident Commission is an arm of the state, administering the act commonly known as the Workmen's Compensation Act (Or. L., Secs.

6605-6659), and that the state is therefore the real party in interest. From these premises he argues, because the state cannot be sued, the Industrial Accident Commission cannot be. The Legislature has provided that the Industrial Accident Commission 'in its name may sue and be sued, and shall have a seal which shall bear the name of the Commission.' Section 6611, Or. L. The Commission is given other powers exercised by a corporation. Section 6629, Or. L., as amended by Laws 1921, c. 311. It is a creature of the Legislature, and is a body corporate.

"This court has held the act creating the Commission to be constitutional. Evanhoff v. Industrial Accident Commission, 78 Or. 503, 154 Pac. 106. The primary duty of the Commission is to administer the act. Section 6611, Or. L. The exercise of judicial functions is incidental to its primary duty, and the act is not unconstitutional on that account. *In re* Willow Creek, 74 Or. 592, 144 Pac. 505, 146 Pac. 475. Nor does the fact that payments from the fund created by the act are to be made by the state treasurer on warrants drawn by the secretary of state render it unconstitutional. Both the secretary of state and the state treasurer are without discretion in regard to that fund. Payments from the fund can be made only upon vouchers transmitted by the Commission. Section 6638, Or. L., as amended by Laws 1921, c. 311. The state is a contributor to the fund, and is, therefore, interested in the fund in the same manner as it is in the fund of the State Board of Agriculture. Tongue v. State Board of Agriculture, 55 Or. 61, 105 Pac. 250." (223 Pac. at 942.)

In People v. Harper, 91 *Ill.* 357, a suit was brought by the state to enforce a surety bond given by one William Harper, as chief grain inspector. It was alleged that Harper, under the rules of the Railroad & Warehouse Commission of Illinois, had collected certain fees, and had thereafter appropriated the same. A demurrer was sustained by the lower court on the ground that the statute

under which the Board of Warehouse Commissioners was created was invalid insofar as it authorized the board to establish rules for the inspection of grain and the imposition of fees and charges therefor. In reversing the case the Supreme Court of Illinois held:

> "That the board thus created is a quasi public corporation, admits of no controversy. Angell & Ames on Corporations, Secs. 23, 24; Dillon on Municipal Corportions, Sec. 9. And it is now too late to question the power to create such agencies in the administration of the government, and invest them with such legislative power as shall be appropriate and necessary to effectuate the objects of their creation. Cities, towns, villages, counties, townships, road districts and school districts are familiar instances of local, corporate and quasi corporate agencies in the administration of the government, invested with powers to some extent of a legislative character. Besides these, and of a different character of public agencies, are boards for the control of the public charitable, penal and reformatory institutions, and that for the construction, management and operation of the Illinois and Michigan canal,—all of which have been and are invested with power and authority to make contracts, fix prices, and adopt such rules, regulations and by-laws as shall be reasonably adapted to and necessary to carry out the purposes of their creation. And the last named board, since the act in relation to the construction, etc., of the canal, approved January 9, 1836, has been invested with and exercised the power of making rules, regulations and by-laws for fixing tolls to be paid for transportation, for governing persons employed about the canal, for injuries done to the canal, locks and tow-paths, and for the management and navigation of the canal." (91 Ill., P. 366.)

In *Bromwell B. & W. G. Co. v. State Board of Charities and Corrections,* 279 *Fed.* 440, the District Court of Kentucky had before it the question as to whether a suit

against the state board was in fact a suit against the state of Kentucky in coming within the inhibition of the Eleventh Amendment of the Constitution of the United States, and in deciding this matter, said:

> "By section 2 of the latter act is is provided that the defendant is 'vested with authority to and shall, except as hereinafter provided, exercise * * * the privileges and discharge all the duties now vested by law in the State Board of Control,' and that the State Board of Control is 'hereby abolished and the terms of office, of the present members of same are hereby terminated.' In neither act is it provided in so many words that the board thereby created is to be a corporation. Notwithstanding such is the case, the former board was, and the defendant board is, a corporation, or at least a quasi corporation, whatever that may mean. Direct authority for this position is to be found in the decision of the Kentucky Court of Appeals in the case of Gross v. Kentucky Board of Managers, 105 Ky. 842, 49 S. W. 458, 43 L. R. A. 703. It was there held that the Kentucky Board of Managers of the World's Columbia Exposition, created by an act of the Legislature of this state, was such an entity, though it was not expressly so provided therein. Judge Hobson said:
>
> " 'So the question is presented whether appellee was invested by the Legislature with the character of a corporation or quasi corporation. It is not necessary that the thing created by the Legislature should be named by it a corporation. Its character depends upon the powers given it, and not upon the name by which the Legislature may call it.'
>
> "In support of the decision, that of the Supreme Court of the United States in the case of Hancock v. Louisville & Nashville R. R. Co., 145 U. S. 415, 12 Sup. Ct. 969, 36 L. Ed. 755, was cited. In the opinion therein it is said:
>
> " 'That this entity was not in terms named a corporation is not decisive. It is enough that an

> artificial entity was created, with power to exercise the functions of a corporation. It was, though not named, a corporate entity.' " (279 Fed. 441-442.)

In Dunn v. The University of Oregon, 9 *Ore.* 357, suit was brought against the board of regents of the State University, and it was contended that the board of regents of the university, not being a corporation, could not be sued, and that the real party defendant was the state of Oregon (see p. 359). In deciding this matter the court said:

> "It is true the Legislature has not declared it to be a corporation in express terms, but this was not essential. (Angell and Ames on Corporations, section 76; Thomas v. Dakin, 22 Wend. 70, 103, 106.)
>
> " 'It is, indeed, a principle of law which has been often acted on, that where rights, privileges and powers are granted by law to an association of persons by a collective name, and there is no mode by which such rights can be enjoyed, or such powers exercised, without acting in a corporate capacity, such associations are, by implication, a corporation, so far as to enable them to exercise the rights and powers granted.' (Angell and Ames on Corporations, Sec. 78.)" (9 Ore., p. 361.)

In Hancock v. Louisville & N. R. Co., 145 *U. S.* 409, 36 *L. Ed.* 755, the court considered and passed upon the validity of a lease made by the Shelby Railroad Company, in connection with which it became necessary to decide whether the Shelby Railroad District, a district created by the Legislature of Kentucky for the purpose of subscribing to stock of such railroad company, was a corporation, the act creating it not expressly providing that it was creating a corporation. The court said:

> "By the Act of 1869, this prescribed portion of Shelby county was authorized to issue bonds and subscribe stock. The bonds when issued were not

the obligations of Shelby county, nor of the individual taxpayers; and still there must be some debtor. That debtor was this portion of Shelby county. Giving to it power to issue bonds and create indebtedness, is the creation of an entity with power to act, and if this entity has power to create a debt it becomes subject to suit. That this entity was not in terms named a corporation is not decisive. It is enough that an artificial entity was created, with power to exercise the functions of a corporation. It was, though not named, a corporate entity, and the Acts of 1870 and 1873, as well said by the Court of Appeals, simply designate who should act for this corporate entity and give it a name."

2. If the Commission be a quasi corporate body, even though it be at the same time a local arm of the state, or an agency of the state government it must be recognized as having an individuality separate from that of the state and as possessing a citizenship within the intent of Section 24 of Judicial Code.

The most commonly recognized exemplification of quasi corporations are counties. Counties "are the mere creatures of the legislative will * * * they are but subdivisions of the state, deriving even their existence from the legislature. Their officers are nothing more than local agents of the state; and their powers may be revoked or enlarged until their acts may be set aside or confirmed at the pleasure of the paramount authority, so long as private rights are not thereby violated." *Board of Commissioners of Laramie County v. Board of Comr's. of Alpine and Carbon Counties,* 92 *U. S.* 307. But it has never been questioned that a county, by reason of its quasi corporate nature is a citizen within the purview of Section 24 of the Judicial Code, and that it has a separate individuality

from that of the state, even when immunity from suit is claimed under the Eleventh Amendment.

Lincoln County v. Luning, 133 *U. S.* 529;
Chicot County v. Sherwood, 148 *U. S.* 529.

3. If not a quasi corporate body, the State Highway Commission of Wyoming is still a legal entity and a juristic being; it is a collective body of individuals and is a citizen of the state by virtue of the citizenship of its members.

Thomas v. Ohio State University, 195 *U. S.* 207.

In the Thomas case suit was brought by a citizen of Michigan against the Board of Trustees of the Ohio State University to effect a partition of certain lands alleged to be held adversely by the defendant board of trustees. Although legal title was in the Board it is apparent that, the land being for the use of a state institution, the equitable title was in the state. The case came before the Supreme Court upon certified questions relating to the jurisdiction of the Circuit Court. The Supreme Court held that the Board of Trustees of the University did not constitute a corporation of the State of Ohio. It held this out of deference to a like holding of the Supreme Court of Ohio, although recognizing that on a jurisdictional question the holding of the Ohio Court was not binding on the Federal Court. But the Supreme Court further held that although not a corporate body, the Board of Trustees might be sued by their collective name providing there was an averment (as in the present action) that each individual member of the Board was a citizen of Ohio:

> "While the state court may not conclusively determine for this court what is and what is not a corporation within the meaning of the jurisdictional rule that a corporation, for purposes of suing and being sued in the courts of the United States, is,

under the Constitution and laws of the United States, to be deemed a citizen of the state by whose laws it is created, nevertheless, this court should accept the judgment of the highest court of a state upon the question whether a particular body created by its laws is or is not a corporation, by virtue of those laws, unless a contrary view is demanded by most cogent reasons involving or affecting the constitutional and statutory jurisdiction of the federal courts. No such reasons exist in this case. (195 U. S. 216-217.) * * * To the second question our answer is that, as the board was entitled to sue and be sued by their collective name, and would be bound by any judgment rendered against it in that name, the jurisdiction of the Circuit Court would have sufficiently appeared, so far as the pleadings were concerned, without bringing the several persons constituting the board before the court as defendants, provided the bill had contained the additional allegation that each individual trustee was a citizen of Ohio." (195 U. S. at 218).

4. The contract for the breach of which this action was commenced is not, as contended, a contract which *by its terms* is a contract between the plaintiff and the State. Authority is given to the Commission by the statute to make contracts in its own name both for state construction and county construction; it has no authority to contract in any other name, than its own. It will be presumed to have contracted in an authorized manner and not in an unauthorized manner.

Sloan Shipyard Co. v. U. S. Shipping Board & Emergency Fleet Corporation, 258 *U. S.* 549, 568.

The recital that it acts in a representative capacity will not operate to bind any others than itself.

State of Ohio v. Swift & Co., 270 *Fed.* 141.

The manner in which the contract was formed and the evidence contained in its provisions show that the Commission, in its own name, was a contracting party. A supplemental agreement between the plaintiff and the Commission, thereafter made, recites that the contract *was* made between the plaintiff and the Commission (Tr. 75-77).

The proposition above made is in reply to the argument contained under Sub-division IV, page 22 of petitioner's brief. It seems logical to consider this matter here, since if it be true that the contract was made by the State in its own name and not by the Commission, the plaintiff is obviously suing the wrong party.

It is true that the formal contract recites that it is an agreement "between the State of Wyoming acting through the State Highway Commission and the Utah Construction Company." (Tr. 71), and that the testimonium clause has the same recital, (Tr. 74). The contract is signed however "State Highway Commission of Wyoming, by L. E. Laird, Superintendent, Z. E. Sevison, Secretary," in an individual and not an agency capacity (Tr. 75). The form of recitals in the contract is undoubtedly confusing. The contract also provided for the payment of sums by the state. This is confusing only in appearance, inasmuch as one person may legally contract for the payment of a sum by another person. After the contract was made the supplemental agreement of the parties straightens out this confusion by referring to the previous contract as having been a contract "between the State Highway Commission of Wyoming and the Utah Construction Company" (Tr. 75). This supplemental contract is signed "State Highway Commission of Wyoming" in an individual and not in a representative capacity (Tr. 77). Nowhere is the name

of the State of Wyoming signed, or its seal attached, signed to the contract.

To say that the contract is a contract which by its terms makes the state a party is to ignore the authority under which the Commission was acting and the power given to it by the statute. The statute creating the Commission (Sec. 3027) provides that "all road and bridge construction work any part of the cost of which is paid from the State Highway fund * * * shall be performed by or under contracts *awarded* by the Commission * * * . All improvements costing more than Two Thousand Dollars shall be constructed upon contracts *awarded* to the lowest responsible bidder after public notice, but the Commission may reject any or all bids * * * . The Commission shall adopt general rules regulating the publication of notice to bidders and the awarding of contracts." The word "awarded" in the connection used, undoubtedly has the sense of "executed." Clearly the intent is not to have the Commission contract in the name of the county in constructing the county highways, and in the name of the state in constructing state highways. At another point the statute provides for an agreement entered into between the county and the Commission (Sec. 3030). At another place the Commission is "authorized to enter into all contracts and agreements with the United States" (Sec. 3031). The Commission is recognized throughout as the contracting party.

Although there is a formal contract (Tr. 71-75), the actual contract is in fact a proposal by the Utah Construction Company "to the State Highway Commission of Wyoming" and an acceptance of the provisions of said proposal. Thus the formal contract provides: "It is also understood and agreed that the advertisement, proposal, bond, specifications and plans, as hereto attached or herein referred to, are all essential documents to this contract and are a part thereof." (Tr. 74). The plans and specifi-

cations, which were submitted to the contractor in advance of his offer, or bid, define the contract entered into by the parties as follows:

> "6. Contract. The agreement between the contractor and the State Highway Commission covering the work to be performed and including the plans and specifications" (Tr. 14).

The specifications provide for the manner of proposals of those desiring to enter into an engagement to construct (Tr. 16). They further provide that "the award of the contract, if it is awarded, will be to the lowest bidder whose proposal shall comply with all requirements necessary to render it formal." (Tr. 17). It is further provided "that all awards will be made with the understanding that the work awarded will be performed by the contractor to whom the award is made * * * and the *contract* shall not be sublet to another contractor except with the written consent of the State Highway Engineer' (Tr. 18).

It is further provided that "the State Highway Commission whenever any of the following conditions exist, may enter upon the performance of the terms of the contract of which these specifications form a part" (Tr. 26). If the said conditions exist the State Highway Engineer will notify the contractor and if the conditions are not complied with and if no effort is made by the contractor or his surety to correct the condition, "the Commission may enter for the purpose of performing the terms of said contract" (Tr. 26). When this is done "the Commission, without violating the contract, may then proceed with the work in any lawful manner it may elect until the work is formally completed and the terms and conditions of the contract are completely performed" (Tr. 27). If the total cost of completing the work "is greater than the contract price, the excess shall be made up and paid to the State

Highway Commission by either the contractor or his sureties. * * * Upon the State Highway Commission entering upon the completion of said contract, it may, if it so elect, pay for such material and labor which has entered into such construction prior to the taking over of the same by the State Highway Commission hereunder, which has not been paid for by the contractor or anyone in his behalf" (Tr. 27). The proposals of the contractor referred to in the formal contract are set out on pages 65 to 69 of the transcript. These proposals are "to the State Highway Commission of Wyoming" (Tr. 65, 67, 69). They recite that "accompanying the proposal is a certified check for $.....payable to the State Highway Commission of Wyoming" (Tr. 66, 68, 70).

The real contract between the parties is all the proposal or offer, on the part of the plaintiff and the acceptance of such offer by the party to whom it was made —that is, by the Commission. The Commission had no authority under the statute to contract in any other way; it was required to *award* the contract in such manner. If in executing the formal contract it recited that it was acting in a representative capacity, it was stating what was obviously untrue. It had no power to act in a representative capacity under the circumstances and to attempt to do so only served to bind itself and not its purported principal.

State of Ohio v. Swift & Co., 270 *Fed.* 141 is applicable to the above statement. It was there held that the unauthorized act of a prosecuting attorney brought in the name of the State was in fact the act of the prosecuting attorney and not the act of the State.

The Commission was moreover the real contracting party to the transaction. The specifications which it gave to the contractor and embraced in its contract recited that it was a contracting party. It will be presumed to have acted according to its purported object.

Sloan Shipyard Corp. v. U. S. S. Bd., E. F. Corp., above cited, contains a holding which is applicable to this point. In the Sloan Shipyard case suit was brought against the U. S. Shipping Board and Emergency Fleet Corp. by various parties who had contracted to build for the Fleet Corporation certain wooden vessels. It was contended that the suit was in reality a suit against the United States and was apparently contended that one contract, constituting a part of the subject matter of the suit, showed upon its face that it was not made with the Fleet Corporation inasmuch as it recited that it was made with the Fleet Corporation representing the United States of America. To this contention this Court, through Mr. Justice Holmes said:

> "We attach no importance to the fact that the second contract, alleged to have been illegally extorted, was made with the Fleet Corporation, 'representing the United States of America.' The Fleet Corporation was the contractor, even if the added words had any secondary effect." (258 U. S. 568).

5. Whether the State is the real party defendant to this action should not be controlled, as assumed in petitioner's brief, by the rule laid down for ascertaining the application of the Eleventh Amendment to the federal constitution, for, in so far as the State's interests are affected by this litigation, it has waived its immunity by consenting that the action may be brought—that is, by providing that the Commission may sue and be sued.

The Eleventh Amendment was enacted in response to the public clamor over the decision of the Supreme Court in Chisolm v. Georgia. *Hans v. Louisiana* 134 *U. S. at* 10-17. The amendment has therefore been given a liberal construction with a view of protecting the State's immunity from suit. *Regan v. Farmers Loan & Trust Co.*, 154-362.

But Section 24 of the Judicial Code has been given a broad and liberal construction with a view of upholding the court's jurisdiction. Those acting in a representative capactiy, when authorized to sue or be sued, for the purpose of federal jurisdiction stand upon their own citizenship irrespective of the citizenship of the persons they represent and whose rights or property are involved. *Mexican Central R. Co. v. Eckman,* 187 *U. S.* 427 and cases cited under paragraph 5 of the Summary of Argument.

The above point is made in view of the fact that most of the cases cited in petitioner's brief to the point that the State in the present action is a real party defendant, notably those on pages 24 and 25, are cases in which the Eleventh Amendment was invoked and the rule underlying its application was discussed. But the question here is not whether the suit is forbidden by the Eleventh Amendment, for it is not. If the Commission be in fact the State contracting under an *alter ego,* as contended, the State has consented to the suit and waived its immunity. But the Commission in the instant case takes the position not that the State cannot be sued, but that it cannot be sued in the Federal Court because it is not a citizen and unless there be diversity of citizenship in the parties, no independent ground of jurisdiction exists. In deciding then whether the suit is in fact a suit against the State, we are not concerned with whether the State's interests are affected, providing, under the general rules of pleading, the state is not an indespensable party to the action. The rule peculiar to the application of the Eleventh Amendment, we submit, is really of no importance.

The difference in the two rules is seen in the following quotations, the one from Regan v. Farmers Loan & Trust

Co. (supra) and the other from Mexican Central R. Co. v. Eckman (supra) above cited.

> "To secure the manifest purposes of the constitutional exemption guaranteed by the 11th Amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held to cover, not only suits brought against a state by name, but those also against its officers, agents and representatives, where the state, though not named as such, is nevertheless the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates."
>
> "We have repeatedly held that representatives may stand upon their own citizenship in the Federal Court irrespective of the citizenship of the persons whom they represent—such as executors, administrators, guardians, trustees, receivers, etc."

6. The fact that the Commission is a mere agency, or arm of the State formed to perform a business or governmental function, does not prevent its suing or being sued in its own name and right, if it is a legal entity. In support of this point we cite cases hereinbefore cited under subdivision 6 of the Summary of Argument, a number of which we desire to review.

In discussing this point it must be borne in mind that the plaintiff has commenced this action merely for the purpose of securing a judgment. It has not sought to recover any property the title or possession of which is in the State; it is not suing to impress a lien upon any property belonging to the State; it is not seeking to compel a state officer to perform an act which will result in the turning over to the plaintiff of State money. The plaintiff has contracted with the Commission in reliance on a

statute which expressly authorizes the Commission to so contract and in which it expressly provides that having so contracted it may be sued. It believed and believes that by creating the Commission the State has so far separated itself from its agency, has so far divorced its own interests from the interests of the Commission, that this suit could be brought.

The State Highway Commission is undoubtedly an arm or agency of the State of Wyoming, but that fact in itself does not render it any the less liable upon its contracts, as is contended on pages 18 and following of respondent's brief. For, as seen, a county is a mere arm or agency of the State and is so far impressed with the State's sovereignty that it cannot be sued without authority of the Legislature. But, if authorized to be sued, as in the case of *Lincoln County v. Luning* 133 *U. S.* 529, it becomes a citizen within the intent of Section 24 of the Judicial Code.

We submit also that no objection to the present section can be made because the state has an ultimate interest in its outcome. The state has an ultimate interest in a suit brought against the county, a school district, a board of trustees of a state university. Judgments secured against these bodies must ultimately be paid out of state money or satisfied out of state property, inasmuch as the bodies sued are at the most merely trustees of the state's interest.

But though the State has an interest in the present action, the State Highway Commission of Wyoming has also an interest. Its interest has been given to it by the statute which authorized it to sue and be sued, which authorizes it to ocntract. It is interested in seeing that no judgment is secured against it which may eventually be satisfied from funds given to it by the State or out of property which the statute apparently authorized it to hold.

The matter of interest in the litigation will be discussed somewhat under a subsequent heading. In all of the cases cited under sub-division 6 of the Summary the defendant was an arm or agency of the State. The following cases are illustrative of the principle involved:

Sloan Shipyard Corp. v. U. S. Shipping Bd. E. F. Corp. 258 *U. S.* 549 was a suit by various contractors against the U. S. Emergency Fleet Corporation incorporated pursuant to congressional legislation by the U. S. Shipping Board. The Fleet Corporation was organized under the general laws of the District of Columbia in exercise, on the direction of the President, of a specified portion of the power and authority, in respect to ships, granted to him. (See *U. S. v. Strang* 254 *U. S.* 472, 493). The U. S. Shipping Board was the sole stockholder. It was contended that, inasmuch as the Fleet Corporation was a mere arm or agency of the government, no jurisdiction would lie, except in the Court of Claims. It had been held in the lower court (268 Fed. 624), in which the nature of the corporation is more fully explained, that the corporation was a mere agent, and that the suits were really against the U. S. government. Considering this proposition this Court, reversing the lower court, through Mr. Justice Holmes, said:

> "These provisions sufficiently indicate the enormous powers ultimately given to the Fleet Corporation. They have suggested the argument that it was so far put in place of the sovereign as to share the immunity of the sovereign from suit otherwise than as the sovereign allows. But such a notion is a very dangerous departure from one of the first principles of our system of law. The sovereign, properly so called, is superior to suit for reasons that often have been explained. But the general rule is that any person within the jurisdiction always is amenable to the law. If he is sued for conduct harmful to the plaintiff

his only shield is a constitutional rule of law that exonerates him. Supposing the powers of the Fleet Corporation to have been given to a single man, we doubt if anyone would contend that the acts of Congress and the delegations of authority from the President left him any less liable than other grantees of the power of eminent domain to be called upon to defend himself in court. An instrumentality of government he might be, and for the greatest ends; but the agent, because he is agent, does not cease to be answerable for his acts." (258 U. S. 566, 567).

Hopkins v. Clempson Agricultural College of So. Carolina, 221 *U. S.* 636, is a case cited in petitioner's brief. On analysis it appears to us to be direct authority for the points we here maintain, namely, that an action against an agency of the state, even though the state may have the ultimate interest in the action, is not an action against the state itself, and this is true even where the Eleventh Amendment is invoked and immunity granted thereby has not been waived. The Hopkins case was an action brought by a land owner against the trustees of the State Agricultural College of South Carolina for damages arising out of the construction of a dike on land occupied by the Board of Trustees and used by them in connection with the Agricultural College, which had resulted in the flooding of the land of the adjoining proprietor, the plaintiff in the action. Title to the land upon which the dyke had been erected by the Board of Trustees was in the State of South Carolina; its possession and use being in the Trustees of the College. It is to be noted, in reviewing the facts in this case, that in erecting the dyke in question the Trustees were acting entirely within the scope of their authority, although wrongfully. It was contended that the court had no jurisdiction inasmuch as the State was the real party against which the action was

brought. The language of the court itself best explains the jurisdictional question considered:

> "There was no demurrer, but the defendant filed what was treated as a plea to the jurisdiction in which it averred that it owned no property, and had constructed the dyke as a public agent only, by authority of the state, on land belonging to the state. By stipulation the hearing was confined solely to the question of jurisdiction, and after considering the evidence, the complaint was dismissed." (221 U. S. at 642).

The court after discussing the general rule under which state officers may be sued, when the Eleventh Amendment is invoked, says:

> "It is said, however, that in the cases referred to, the officers were held liable to suit because, in the transaction complained of, the statute being unconstitutional, they could not be treated as agents of the state. And it is argued that these authorities have no application to suits against those public corporations which exist, and can act, in no other capacity than as governmental agencies, or political subdivisions of the state itself. But neither public corporations nor political subdivisions are clothed with that immunity from suit which belongs to the state alone by virtue of its sovereignty. In Lincoln County v. Luning, 133 U. S. 529, 33 L. Ed. 766, 10 Sup. Ct. Rep. 363, the court said that 'while the county is territorially a part of the state, yet politically it is also a corporation, created by and with such powers as are given to it by the state. In this respect it is a part of the state only in that remote sense in which any city, town or other municipal corporation may be said to be a part.' The court there held that the 11th Amendment was limited to those cases in which the state is the real party, or party on the record, but that counties were corporations which might be sued. Dunn v. University of Oregon, 9 Or. 357, 362; Herr v. Central

Kentucky Lunatic Asylum, 97 Ky. 463, 28 L. R. A. 394, 53 Am. St. Rep. 414, 30 S. W. 971." (221 *U. S.* 643.)

Continuing, the court states that the board of trustees claimed that the college never had an interest in the land described in the complaint or any other property connected with the establishment and maintenance of the college, all of it being the property of the state of South Carolina, "and it is argued that the court could take no jurisdiction of the case against the public corporation, which, at most, could only result in a judgment unenforceable by levy and sale under execution." To this the court replied:

> "As a matter of fact the record indicates that besides the annual appropriation of the state and the interest on securities held by the state, the college has other sources of income. It appears to hold some land in fee simple. The charter authorizes it to receive bequests. So that if the Fort Hill place is not subject to levy and sale, it does not follow that the institution may not now or hereafter own property out of which a judgment in plaintiff's favor could be satisfied. *Besides, we have no right to proceed on the theory that if, at the end of the litigation, plaintiff establishes his right to damages, the judgment would not be paid. These suggestions, though made in pleas to the jurisdiction, afford no reason why the college should be granted immunity from suit, when it is claimed that, in violation of the Constitution, it has taken private property for its corporate purposes without compensation.'* (221 U. S. at 648.) (Italics ours.)"

The opinion should be read in connection with the opinion of the Supreme Court of South Carolina which was reversed. (*Hopkins v. Clempson Agricultural College of So. Carolina*, 77 *S. C.* 12).

It is to be noted that the action in the Clempson case

was brought not against the Trustees as individuals, but as a board, and that the result of a judgment against them would have been to subject the property or money which came into their possession as a board to the satisfaction of the judgment; that any property or money so coming into their hands would be actually the property of the state entrusted to them for the performance of the state function which they, as a state agency, were performing; so that the *ultimate* interest in the action was in the state itself, notwithstanding the agency or arm of the state was sued.

It is to our mind of no significance that the action in the Clempson case was in tort and not upon a contract. If such a state agency can be sued, not individually but in its agency capacity in tort in just reason they may be sued *ex contractu*. The result in either case is the same, to secure a judgment which may be satisfied out of funds in its hands, if it has any such funds, and if not, out of funds which the legislature may appropriate to it for that purpose. Apparently jurisdiction of the Federal Court in the Hopkins case was invoked on the ground that there had been a depriving—in this case damaging—of property without due process of law. But the ground upon which jurisdiction was obtained is to our mind unimportant providing any ground exists. The remedy should be given whether jurisdiction was obtained on the ground of diverse citizenship to the same extent as if obtained under another provision of the Judicial Code.

Port of Seattle v. O. W. R. R. Co. 255 *U. S.* 56 was a suit brought by the Port of Seattle, a corporation created by the Legislature of the State of Washington for the purchasing and managing the State's tide lands. The statute creating the Port prescribed that it should be a municipal corporation, but it was apparently a municipal corpora-

tion only in the loosest sense. (See *Madden v. Lancaster County*, 65 *Fed.* 191.) In reality it answers to the definition of a quasi corporation. The object of the suit was to quiet the title of the *State of Washington* to said lands owned by the State as against an asserted claim of the defendant Railroad Company, an Oregon corporation. Jurisdiction was invoked on the ground of diversity of citizenship. The case came before the Supreme Court on direct appeal under Sec. 238 of the Judicial Code, as it then existed, to be decided on the jurisdictional question involved. In deciding the matter of jurisdiction the Court says at page 71,

> "Objection to the jurisdiction of the District Court is clearly unsound. The Port, being a municipal corporation under the laws of Washington, is a citizen of that state, and could have been sued in the Federal Court."

The Court further says,

> "It (the port) had both the power and the duty to bring suit to protect the interest here involved, and it had a direct financial interest in the result. For chapter 168 of the Laws of 1913 provides for a payment by abutting owners in the nature of a rental, for the permit to use ports of the waterways in the erection of wharves, docks or other structures; and that 75% of such rental shall be paid to the county 'for the use of said port district.' The Port has thus an independent financial interest in this controversy; and although the state has also an interest, suit *against* the Port would not be prevented by the 11th Amendment. What effect the judgment in this case will have upon the state's interest, we have no occasion to consider." (255 U. S. at 71).

The Port of Seattle case may thus be said to stand for the following concrete propositions: First, the state is not a necessary party to a suit brought by (or against)

a state agency for the purpose of quieting title to the state's land, providing such agency has also an independent financial interest in the controversy. Second, such independent financial interest may consist of a mere right in the agency to expend, in performing its state's functions, a certain part of a fund derived from the rental of the state land, which fund is not in the custody of the agency, but it is in the express custody and possession of another state agency, namely, a county.

Parke et al v. Carriere Consol. School Dist. 12 *Fed.* (2*d*) 37. (C. C. A. 5th.), was an action originally brought in the state court of Mississippi by citizens of Louisiana and Maryland against a consolidated school district organized under sections 3999-4006 "Hemmingway's Code of Mississippi, represented and acting therein through its trustees. The case was removed to the U. S. District Court on the ground of diversity of citizenship. It was claimed by the defendant that the Federal Court had no jurisdiction, inasmuch as the school district was identical with the state and that the state cannot be a citizen within the meaning of the removal act.

The case should be read in connection with Nabors v. Holly Bluff Consolidated School Dist., 135 Miss. 608; 100 So. 177 and Ayres v. Agricultural High School, 98 So. 847, in which the Supreme Court of Mississippi held that authority to sue such school districts was not given by statute either expressly or by implication and that in the absence of such authority, no suit could be brought against a governmental agency: "A consolidated school district • • • is a governmental sub-division and agency exercising governmental functions. Neither the state nor any of its governmental sub-divisions exercising such functions is subject to suit unless expressly or by necessary implication it is so provided by statute. Those dealing

with the state or any of its governmental agencies do so with the understanding that any rights they may have are not enforceable in the courts unless the law so authorizes" (*Nabors v. Holly Bluff Cons. School Dist.* 100 *So.* 177). "Only the Legislature can surrender this privilege of the sovereign state and its governmental subdivisions or agencies" (*Ayres v. Board of Trustees,* 98 *So. at* 850).

But the Circuit Court of Appeals held that, under the ruling of the Supreme Court of Mississipi, consolidated school districts could never-the-less sue in their own name, and being so authorized were endowed with citizenship. In upholding the Federal jurisdiction the Court said:

> "If a school district is authorized by the legislation creating it, as construed by the courts, to contract and sue in its own name, then it is a body corporate, or a quasi corporate body, and as such a citizen of the state under which it is organized, within the purview of the Removal Act. This is true, though it may also be protected from suit by statute or court decision. A mere bureau or department of a state government cannot sue in its own name, or be a plaintiff. *Conferring on a school district capacity to contract and sue in its own name, of itself, makes of it more than a mere governmental bureau. The authority to institute suits in its own name subjects it to the burdens of a suitor including those arising under the Removal Act.* Suits can be maintained only by legal entities—persons, corporations, or quasi corporations. *The legislation that is sufficient to empower a school district to sue in its own name makes of it a legal entity, and a citizen within the meaning of the Removal Act.* In this case the state of Mississippi is not a party plaintiff on the record.
>
> The plaintiff is the school district or the trustees. Although it be true that the state is to be the beneficiary of the recovery, this does not make it a party to the record, any more than the fact that a

recovery in a suit by a personal representative goes to the distributees of the intestate prevents the personal representative from being the party plaintiff to the record for removal purposes." (12 Fed. (2d) at 38).

It may be argued from the above quotation that the present action may not be brought because the Commission is a part or division of what is designated as the State Highway Department. But the term "department" has no binding significance. The Court will look to the nature of the body thus created and not to the name which is given it. And inherent in its being is the power to contract and to sue and be sued in its own name—powers inconsistent with the notion that it is the state itself.

There is a seeming confusion in respondent's brief in the use of the term "agency". It is assumed that because the Commission is an agency of the state, it necessarily acted as agent for the state in making the contract, the state acting as principal. But there is a wide difference between the liability of an agent who, within the scope of his authority, contracts in his principal's name, and a legal entity contracting in its own name in the performance of a function delegated to it. A mere agent does not purport to act for himself but for his principal; the law says that only his principal shall be liable. But a state agency, such as this, is required to contract in its own name; the law creating it, says that it shall be liable—may be sued—on its contracts. The state has delegated to it the power to contract and placed upon it the burden of responsibility of a contracting party.

The fact that the contract may be for a highway, title to which shall be in the state, does not make the Commission, the contracting party, any the less liable. The fact that the Commission has promised that the State, rather than the Commission, will pay the money earned, does not

make the Commission any the less liable for breach of its contract, if the money is not paid. The contract might have been for a state and county highway, part to be paid by the state and part to be paid by the county, yet it will not be contended that for breach of such a contract both state and county must sue or be sued.

In this connection we wish to point out that the fact that the *ultimate* interest in the contract and in the suit is in the state does not make the state the contracting party, or a party to the action. The state has divorced itself from its interest both in this contract and in the suit; it has delegated that interest to an entity which it has created for that purpose. To illustrate: in the case of *Sloan Shipyard Corporation v. U. S. Shipping Board Emergency Fleet Corporation*, 258 *U. S.* 548 (previously cited), the Emergency Fleet Corporation was undoubtedly an agency of the United States. It was created, as an adjunct of the U. S. Shipping Board, which was performing a governmental function for the U. S. Judgments against it, if paid, would ultimately be paid by the U. S. Yet the Fleet Corporation is required to shoulder the burden of its own contracts and stand in court to answer for them.

7-8. That the Commission has no funds or property out of which a judgment may be satisfied, *if such be the fact*, does not render the Commission any the less a party to the action. If there are no funds or property of the Commission which can be reached in satisfaction of a judgment it will be presumed that the Legislature, which authorized the Commission to be sued, will eventually supply it with funds to satisfy any judgments rendered against it.

Ward v. Board of Regents 138 *Fed.* 372;

Hopkins v. Clempson Agricultural College 221 *U. S.* 636;

Phoenix Lumber Co. v. Regents of the U. of Idaho 197 *Fed.* 425;

Board of Trustees of the University of Ill. v. Bruner 51 *N. E.* 687-688 (*Ill.* 1898).

The question as to how a judgment may be collected is not before the court on this jurisdictional question. *But if considered by the court it should be held that the Commission has or may have property and funds out of which a judgment may be satisfied.*

Ward v. Board of Regents of State Agricultural College 138 *Fed.* 372 was an action for damages against a state agency. Ward claimed damages for breach of his contract of employment with the Board of Regents of the State Agricultural College of Kansas and invoked the jurisdiction of the Federal Court on the ground of diverse citizenship. The case went off on general demurrer, but in considering the propriety of sustaining the demurrer the Circuit Court of Appeals of the Eighth Circuit says:

> "The action of the trial court is justified upon three grounds: (1) It is contended that because the board of regents is simply a governing body, without property or the power of taxation, and receives all its funds by legislative appropriation, it cannot be sued unless a fund has been placed in its hands to meet the claim on which the action is based, and that in the absence of such a fund the plaintiff's only legal redress is by petition to the State Legislature. * * * (Page 373.)
>
> "The first contention of defendant finds its complete answer in the statute. The board shall have full control of the agricultural college. It may enter into contracts not only for the employment of the faculty, but also for maintaining the institution and for erecting such buildings as may be necessary from time to time. It is expressly given the power to sue and be sued in respect of any of these matters. When a judgment is recovered against the board, it may lawfully apply to its discharge any funds in its hands not otherwise

specifically appropriated, and, in case no funds exist for the purpose, it will be presumed that the Legislature will discharge its duty by providing a fund to meet any liability of the board which is thus judicially established." (Page 374).

Hopkins v. Clempson Agricultural College (supra) has been already discussed. This Court, considering the force of the argument that the lack of property in a state agency exempts such agency from suit uses the following language:

> "Besides, we have no right to proceed on the theory that if, at the end of the litigation, the plaintiff establishes his right to damages, the judgment would not be paid. These suggestions, though made in pleas to the jurisdiction, afford no reason why the College should be granted immunity from suit when it is claimed that in violation of the constitution it has taken private property for its corporate purposes without compensation." (221 U. S. at 648).

In *Phoenix Lumber Co. v. Regents of the University of Ida.* (Supra) a similar question was considered by District Judge Dietrich, now a member of the Circuit Court of Appeals 9th Circuit. Action had been brough against the regents of the University of Idaho for recovery upon a contract. The Court uses the following language:

> "The objection is urged that, if a judgment is rendered against the defendant, it follows that the court may direct the seizure and sale of its property—that is, of the University—in order to satisfy the judgment, and that no such result could have been contemplated by the Legislature. The objection goes, not to the power of the Legislature to subject the defendant to the jurisdiction of the courts, but, in the absence of an express provision to that effect, the consideration is supposed to militate against the reasonableness of the view that the power of the defendant to be sued is implied.

It is not at this time necessary to decide in what manner a judgment could or should be enforced against the defendant, or whether the court could or would, for the purpose of executing its judgment, cause the property of the defendant to be seized and sold." (197 *Fed.* 425 *at* 428-29).

The Supreme Court of Illinois in the case of *Board of Trustees of the University of Ill. v. Bruner*, above cited, was considering an action brought against the Board of Trustees of the University for a balance due upon a contract. In upholding the suit the Court says:

"The legal points raised here are that the trial court erred in refusing to require the plaintiff to answer as to how much he received from the Chicago University, and in refusing to hold, as a proposition of law, that the defendant could not be sued, being a mere agency of the state. * * * The second assigned error is, in our opinion, wholly without merit. The charter of the university expressly provided that it may sue and be sued, plead and be impleaded. The provision is substantially that found in all the charters of charitable institutions of the state, boards of education, school directors, and other similar governmental agencies. It has never been doubted that these corporations could be sued, the same as individuals. We cannot, if we would, disregard the plain language of the statute. *The judgment here makes no provisions for the issuing of execution, and therefore the question whether the trust property of the institution may be sold to satisfy the judgment is not presented.* When the legislature has expressly so stated, we can see no reason why the disputes between corporations like this and others should not be adjusted in the legal tribunals. No rule of public policy prohibits it." (51 N. E. at 687-88).

We have discussed the above matter in the light of the opinion of the Circuit Court of Appeals. (Tr. p. 136). But in considering this opinion we wish to express our regret that

the statement was made that the Commission has no property out of which the judgment may be paid. To our mind such statement was not necessary to the decision of the case. So long as the object of the suit was merely to secure a judgment against the Commission, so long as the plaintiff did not seek to impress a lien upon or secure possession of state property or funds, it was immaterial whether the Commission has any property or not. The question before the Court was not whether the judgment could be collected, but whether the necessary effect of the judgment would be to deprive the state of property or funds which it owned. The statement of the Court, if held to be the law of the case, has in a sense foreclosed the plaintiff of its right to satisfy whatever judgment it may secure out of whatever property the Commission may have at its disposal.

We respectfully suggest that if this Court upholds the jurisdiction in this action it expressly state that the manner of collecting a judgment be left until occasion calls it forth, and that at that time the plaintiff be permitted to limit the question as to whether the Commission has funds or property that can be reached.

If the matter must be decided, or stand decided, may we also suggest that it is incorrect to say that the Commission has no property. The plain intendment of the statute is that the Commission may acquire property; it has the right to purchase property; it cannot perform highway construction and maintenance work without property. Whether such property can be reached by process is a question which must ultimately, but should not now, be considered.

Also we believe that the so-called State Highway Fund provided for in the statute is not, in strict sense, a state fund any more than in the sense that money in the pos-

session of a county treasurer, or the treasurer of a school district, or the secretary of a state prision board, is state money. In each of these cases the ultimate title to the money of course is in the state; it is placed in the possession of a state agency for the fulfillment of the purpose for which the agency was created. If a judgment is authorized against such agency, then truly one of the purposes for which the money is placed in charge of the state agency is to satisfy such judgment.

Now the State Highway Fund is a fund made up from many sources. It consists not only of money placed there by the state, but moneys which the counties may deposit with the State Treasurer for the construction of county highways, or moneys which are donated to the fund for the purpose of constructing highways, and of any other funds which may lawfully come into the hands of the treasurer for the purpose of supplying the fund. The fund is in reality an endowment to the State Highway Commission. It is not a part of the general fund of the state and does not revert, as other funds do, to the general fund. It can be paid out only upon vouchers issued by the State Highway Superintendent. A reading of the statute indicates that the State Highway Superintendent, appointed by the Commission, is the agent of the Commission to satisfy the contracts which the Commission makes and the obligations which it incurs. The fund may rightly be said to be a fund absolutely subject to the disposal of the Commission for all of its various purposes, state, county and municipal. It is seemingly admitted in petitioner's brief, through the citation of certain authorities therein contained, that if this fund had been placed in the custody of the Commission, the Commission would then have had property out of which the judgment could have been paid. But in just reason there is no distinction between placing the fund in the hands of the state treasurer to be expended

solely by the Commission for its various uses and purposes, and placing the fund directly in the hands of the Commission to be so expended. In either instance it is a fund of the Commission; in either instance the state has no discretion with respect to the expenditure of the fund and has no jurisdiction over it except in so far as a state always has jurisdiction through its legislature over a fund in the possession of one of its arms or agencies.

It is true that the state undoubtedly has an interest in this fund, but it has expressly consented, as we think, in consenting that a judgment may be secured against the Commission, that its interest is transferred to the uses and purposes of its agency. Also it has no greater interest in the fund than it would have if the Commission had the actual possession and custody of it. The case of *Butterfield v. State Industrial Accident Com.* 111 *Ore.* 149, 223 *Pac.* 941 correctly reasons the situation, as we believe, in the following language:

> "Nor does the fact that payments from the fund created by the act are to be made by the state treasurer on warrants drawn by the secretary of state render it constitutional. Both the secretary of state and the state treasurer are without discretion in regard to that fund. Payments from the fund can be made only upon vouchers transmitted by the Commission. Section 6638, Or. L., as amended by Laws 1921, c. 311. The state is a contributor to the fund, and is, therefore, interested in the fund in the same manner as it is in the fund of the State Board of Agriculture." (223 Pac. at 942.)

Our position then is that the State Highway Fund is a fund of the Commission in which the state, counties and municipalities, as well as those who may donate sums to it are interested, as well as the state; that the state treasurer is ex officio the treasurer of the Commission in the

matter of keeping and expending the funds is merely the machinery which the legislature has provided for its disposition by the Commission.

9. The decisions of the Supreme Court of Wyoming purporting to construe the statute creating the Commission are not binding on this court for the reason that the contract and rights accruing thereunder originate prior to such state decisions. *Burgess v. Seligman*, 107 *U. S.* 123-133; *Kuhn v. Fairmont Coal Co.* 215 *U. S.* 349-360; 25 *C. J.* 843.

It is claimed on pages 10 and following of petitioner's brief that the Supreme Court of Wyoming has construed the statute, under which the Commission derives its being, in the cases of Hjorth Royalty Co. v. Trustees of the University (30 Wyo. 309) and Frazen v. Southern Surety Co. (35 Wyo. 15). Under this construction it is claimed the Commission has been held to be the state itself. Such construction is held to be binding on this court. In both of these cases it will be noted that the Supreme Court of Wyoming made no attempt to place a construction upon the statute. The Hjorth Royalty Co. case was a suit to quiet title to land which was owned by the State of Wyoming and the real point in the case was that the state was the necessary party to a suit to quiet its title. In the Franzen case the question was whether a certain contract was between private individuals or between an individual and a public body, and the real holding was that the State Highway Commission was a public body although the court stated that it was "one of the departments of the state itself." The language referred to in respondent's brief, we believe, is clearly dictum and would not in any event be binding on this court under the authority of *Carroll v. Carroll*, 16 *Howard at* 286.

But aside from this and more important is the fact

that the contract out of which the present action arose, and the rights accuring under it, arose long prior to the decisions of the Supreme Court of Wyoming referred to. The contract was made on June 1, 1922. The Hjorth Royalty Company case was decided in 1925. The Franzen case was decided in 1927.

The rule as to the binding force on this court of decisions rendered in such manner is thus expressed:

> "So when contracts and transactions have been entered into and rights have accrued thereon, under a particular state of the decisions or when there has been no decision of the state tribunals, the Federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State Courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal Courts will lean towards an agreement of views with the State Courts if the question seems to them balanced with doubt."

Burgess v. Seligman, 107 *U. S. at* 33 *and* 34.

While a decision of the Supreme Court of Wyoming, even after the contract had been formed and rights accrued under it, is entitled to respectful consideration, we feel that in the present instance, inasmuch as the precise point involved in the instant case was not before the Supreme Court of Wyoming and inasmuch as the Supreme Court of Wyoming made no pretense of analyzing the statute or even of citing the statute in its decision, the language used by it and quoted in respondent's brief is entitled to little weight.

10. On matters involving its jurisdiction the Federal Courts are not bound by decisions of a state court but will

exercise their independent jurisdiction. (See cases cited under subdivision 10 of the Summary of Argument).

We submit this point on the authorities cited without further comment. The Federal Court, by the demurrer, was called upon to pass on its own jurisdiction. It was not required to accept decisions of the state court on such jurisdictional matter. The question as to whether the State or the Commission was the real party to the action was the exact jurisdictional question in point.

11. Having established the Commission as a body in its nature suable the Legislature of Wyoming could not by its amendment to Sec. 3025 of the statute restrict jurisdiction to its own courts and thus abridge the jurisdiction of the Federal Court.

Chicot County v. Sherwood 148 *U. S.* 529;
Barrow Steamship Co. v. Kane, 170 *U. S.* 100.

In the latter case the court, considering an attempt of a state to confine suits against a suable party to its own courts, says:

> "The jurisdiction so conferred upon the national courts cannot be abridged or empowered by any statute of the state. Hyde v. Stone, 20 How. 170-175; Smith v. Ames, 169 U. S. 466. It has therefore been decided that a statute which required all actions against a county to be brought in the county court, does not prevent the Circuit Court of the United States from taking jurisdiction of such an action, Chief Justice Chase saying that 'no statute of limitation of suability can defeat a jurisdiction given by the Constitution.' "

12. Insofar as the state's interests are affected by this action and insofar as it is represented by the Commission the state waived its immunity by the Commission's volun-

tary appearance in the action by filling its general demurrer and its answer on the merits. *Clark v. Barnard* 108 *U. S.* 436; *St. Louis & S. F. Ry. Co., v. McBride* 141 *U. S.* 27. Having thus submitted to the jurisdiction the state could not revoke jurisdiction in the Federal Court, over which it had no control, by changing the statute. The state decisions with respect to the revocation of jurisdiction in state courts have no application, since the revocation of consent serves also to revoke jurisdiction in the state court.

The record shows that the Commission appeared in the action and in addition to filing its demurrer to the jurisdiction filed its general demurrer and thereafter filed its answer. It was appearing in the case and contesting the same on the merits at the time when the legislature of Wyoming amended the act restricting suits against the Commission to the state court. It continued to appear generally in the action long after the amendment to the statute had gone into effect both by its answer on file and by its general demurrer to plaintiff's reply. It cannot voluntarily appear in an action and contest the same on the merits and at the same time object to the jurisdiction of the state court. The case above cited under this division, we believe, are authority on this point.

Numerous decisions of state courts are cited in petitioner's brief to the effect that the state's consent to be sued can be revoked even after the commencement of action. But an action in a state court is commenced in a tribunal the jurisdiction of which is controlled by the state legislature. An act of the legislature after the commencement of such suit operates not merely to revoke the consent of the state to be sued, but also revokes the jurisdiction of a state court to hear it. This is not true of an action commenced in a federal court. The state legislature has no power to abridge the jurisdiction of the federal court.

The proposition suggested under this sub-division of our brief is really a matter of supererogation however, since, as seen under sub-division 11 hereof, the state by establishing a body suable in its nature and having a citizenship,, is powerless to confine suits against it to its own courts.

13. Federal cases cited in petitioner's brief holding that the state is a party to the action are cases in which the Eleventh Amendment was invoked and in which the direct object of the suit was to deprive the state of its property, affect its property interests or compel the performance of some political function by a state officer. These cases have no application to an action like the present, in which the object is merely to secure a judgment against a suable body and no attempt is made to charge the state with liability or to affect its interests, except as the state may be ultimately interested.

Some of the cases heretofore cited in this brief with respect to the right to sue a state agency have been cases in which the Eleventh Amendment was invoked and the rule governing its application has been discussed. They were cited to show that even where the Eleventh Amendment is invoked, suits against state agencies are not forbidden. But we do not wish to recede from our position that the rule underlying the application of the Eleventh Amendment, which is liberal with a view of protecting the state's immunity, is not the rule governing the question of citizenship, or the question of the necessary parties to the record, where, as here, the state, in so far as its interests are concerned or affected, has expressly consented that the suit may be brought.

The cases cited on page 24 and 25 of petitioner's brief were all cases in which the Eleventh Amendment was in-

volved. They were also cases in which the object of the suit was directly to deprive the state of its property, or compel some political action on the part of a state officer.

Hagood v. Southern, 117 U. S. 52 was a suit brought against state officers to compel specific performance of a state contract by compelling such officers to perform an obligation belonging to the state in its political capacity. The contract in the case was made by the state itself and the result of a judgment would have been to compel the performance by the state of its contract. If, in the instant case, the contract was made not by the state but by the Commission, as we contend, Hagood v. Southern has clearly no application.

Louisiana v. Jumel, 107 U. S. 711 was a case in which the plaintiff proceeded directly against the auditor of the State of Louisiana, its treasurer and its board of liquidation by application for a mandamus to require these officers to appropriate certain state funds on hand to the payment of the interest due on bonds theretofore issued by the state and held by the plaintiff, and further to proceed to collect taxes for the payment of such interest. The direct object of the action was to compel state officers to pay out state money. It was a suit directly against the state inasmuch as it was in effect a suit for state property.

Ex-party Ayres, 123 U. S. 1 was a suit by aliens to enjoin the Attorney General of Virginia from bringing any suit in the name of the state to enforce the collection of taxes, the contention being that the state, by contract with the plaintiff, agreed to accept the payment of taxes in satisfaction of an obligation to the state. The object of the suit was and the effect of the judgment would have been to compel a performance *by the state* of its contract.

Smith v. Reeves, 178 U. S. 436 was a suit against a state treasurer to compel the treasurer to pay out certain

state moneys. Here again the object of the suit was to get possession of a state property and the effect of a judgment would have been to compel the treasurer to pay out state money from the *general funds* of the state.

Murray v. Wilson Distilling Co., 213 U. S. 151; Lankford v. Platte Iron Wks. Co., 235 U. S. 461; in re State of N. Y., 256 U. S. 490; are all cases in which the necessary effect of a judgment would have been to *compel* the paying out of state funds, inasmuch as the court held that the funds forming the subject of the suit were in effect funds of the state.

Other decisions of the Supreme Court cited on page 25 of respondent's brief are of similar effect.

14. Decisions of state courts cited in the petitioner's brief are mainly distinguishable in their facts but illustrate the attitude of state courts in regarding over-jealously the state's sovereignty and its exemption from suits in its own courts.

State v. Field 27 N. M. 384; decided by a state jurisdiction, is of a piece with the federal decisions last mentioned. It was an application for a writ of mandamus to compel the Commissioner of Public Lands of New Mexico to convey certain public lands of the state, which the applicant had contracted to purchase from the state free from the state's reservation of mineral rights. The state had not contracted to convey the land free of its mineral rights, but had reserved these rights. It was held that if the state had contracted to convey its land without reservation, the defendant Commissioner might be compelled to issue an instrument of conveyance to the plaintiff, inasmuch as doing this would be a mere ministerial act subject to control by mandamus. But since the state had not so contracted, the action was in effect against the state, since the direct object of the suit was to secure the conveyance

of state property. The rule of the Eleventh Amendment is discussed and apparently followed as the rule governing the general question of the state's immunity from suit.

McDowell v. Fuller 169 Mich. 332, cited on page 325 of respondent's brief, was a suit against the warden of the Michigan State Reformatory for breach of a contract. The statute creating the State Reformatory provided that the warden might sue and be sued by "his name of office." Judgment was secured against the warden and after judgment and during appeal the authority to sue and be sued was repealed by the legislature. It was held that the action was against the state and that the consent to be sued might be revoked by the state, and that such consent automatically dismissed the appeal. In making this holding the rule underlying the application of the Eleventh Amendment of the Constitution of the United States was applied. This case is distinguishable from the present action for the reason that the authority was to sue the warden by his "name of office," that is, as an officer, or agent of the state; the use of the term "office" indicating that the warden was not a state agency but a state officer. Generally the case is distinguishable on the ground that the question considered was the state's immunity from suit, where consent had not been given to sue, and the state court laid down a self-protective rule for the preservation of the state's sovereignty.

U. S. v. McCallum 281 Fed. 834 cited on page 25 of respondent's brief is the same case in the lower court as McCallum v. U. S. 298 Fed. 373 (C. C. A. 9th). This was an action by the United States against the Board of State Harbor Commissioners of the State of California for violation of the Federal Safety Appliance Act in the operation of a state owned and operated railroad. It was held that the State Board was subject to the suit because the acts performed were unauthorized acts and wrongful, and that

question as to whether such judgment can be secured, except it may be said that in the absence of an express authority to be sued the fact that a legal entity operating as a state agency is given no funds or property tends to rebut the notion that it was the intention of the legislature that it should be subject to suit.

Curits Co. v. State Highway Commission, 91 N. J. Eq. 421, 111 Atl. 16 is cited on page 14 of respondent's brief as authority to the point that the State Highway Commission of Wyoming in the case at bar was a mere *alter ego* of the state. The only question involved in this case was whether the State Highway Commission of New Jersey was a "municipality." Under the title of the act creating the N. J. Highway Commission, which was held to govern the language of the act itself, it was decided that the term "other municipalities" applied only to municipalities like cities, towns and townships and not to those loose, or quasi coroprate bodies, like Commissions. (111 Atl. 16). General language in this case to the effect that the Commission was a mere alter ego of the state must be taken in connection with the precise point decided.

15. The Wyoming constitutional amendment did not create the Commission; it does not affect its purpose, or control its nature.

It is claimed that the nature of the Commission takes color from the provision of the constitutional amendment of Wyoming adopted in 1916 under which the legislature was empowered to provide for the construction and employment of public highways in whole or in part by the state. Attention is called to Section 6 and Section 9 of Article XVI of the Constitution of Wyoming appearing in the Appendix. A reading of these two articles shows that it was the intention of the constitutional provision adopted in 1916 that the state might thereafter engage in the construction and maintenance of public highways both di[illegible]

ly and indirectly. In creating the State Highway Commission the Legislature has chosen to provide for the construction of highways by the state indirectly; that is by creating a separate entity representing territorially defined districts of the state, representing the various counties of the state and to an extent representing municipal corporations of the state, as well as the state itself. The Commission represents the interests of all of these political sub-divisions of the state and not merely the interests of the state independently. Each sub-division, including the highway, or commissioner, districts, are recognized as having an interest in highway construction performed by the Commission. To be sure the contract in the present instance was a contract representing a state's interest, but the body making the contract was not the state itself but a body formed to represent all of these various interests, as they might arise. In exercising the power to engage directly or indirectly in highway construction the Legislature might have authorized the various Boards of County Commissioners to build highways through their respective counties under aid from the state. The Legislature might have created highway districts, controlled by commissions, vested with express corporate existence, having power to collect from their districts a part of the expenditure of building highways and the power to receive the other part from the state. The Legislature chose rather to create a body which would represent the interests of state, county, towns and districts and in doing this it has created an intervening entity sufficiently separted from itself to be recognized by the courts as a party in interest in a suit brought against it in its own name.

The fact that the Act of Congress furnishing federal aid to the states does not in express language provide for the giving of aid to an arm or agency of the state, does not alter the nature of the agency which the state has thus

created. To our perception there is nothing in the Federal Aid Act itself to prevent the furnishing of aid to the state through any agency which the state may designate representing not only the state but its various governmental subdivisions or arms of government.

CONCLUSION

In conclusion of the whole matter we submit that the judgment of the Circuit Court of Appeals should be affirmed and that the opinion of the Court in affirmance thereof should expressly state that the question as to whether there be property out of which the judgment which respondent seeks may be collected is a question not before the court on this jurisdictional matter; or, if before the court, that there is property which can be reached, as hereinbefore suggested.

Respectfully submitted,

JOHN W. LACEY,
HERBERT LACEY,
WILLIAM L. WALLS,
BENJAMIN S. CROW.
Counsel for Respondent.

APPENDIX

"The district courts shall have original jurisdiction as follows:

(1) First. Of all suits of a civil nature, at common law or in equity * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00, and * * * (b) is between citizens of different States and ~~Foreign States, citizens or subjects~~."

Judicial Code, Sec. 24, *Subd.* 1; *U. S. Code, Sec.* 41, *Subd.* 1.

ARTICLE XI.

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Eleventh Amendment to Constitution of United States.

"CHAPTER 186.

STATE HIGHWAY DEPARTMENT.

§3025. Commissioners — Appointment of — Qualification—Offices—Duties.

"There is hereby created a state highway department to consist of a state highway commission and a state highway superintendent. The said commission shall consist of five state highway commissioners, who shall biennially elect their chairman. The said commissioners shall be appointed by the governor by and with the advice and consent of the senate and each shall serve for the term of six years; provided, that upon the passage of this chapter, the governor shall appoint two commissioners for the term

of two years, two commissioners for the term of four years, and one commissioner for the term of six years. One commissioner shall be appointed from each of the following described districts: District No. 1, composed of the counties of Laramie, Albany, Platte and Goshen; District No. 2, composed of the counties of Carbon, Sweetwater, Uinta and Lincoln; District No. 3, composed of the counties of Niobrara, Converse, Natrona and Fremont; District No. 4, composed of the counties of Hot Springs, Washakie, Big Horn and Park; District No. 5, composed of the counties of Sheridan, Johnson, Campbell, Crook and Weston. If any commissioner shall cease to be a resident of the district from which he is appointed, his office shall be vacant; all vacancies from any cause shall be filled by appointment by the governor for the unexpired term. Each of said commissioners shall qualify by taking the constitutional oath of office and each shall receive a salary of six hundred dollars per year and his actual and necessary traveling expenses while away from his home in the performance of the duties of his office, to be paid from the state highway fund hereinafter provided. The commission shall maintain offices in the state capital, which shall be in charge of the state highway superintendent. The commission shall have the power to sue in the name of the 'State Highway Commission of Wyoming,' and may be sued by such name in any court upon any contract executed by it. The attorney general shall be the legal advisor of the commission and shall prosecute and defend all action and appear in all proceedings in any federal department in which the commission shall be a party or be interested. The commission shall have a seal bearing the words 'State Highway Commission of Wyoming, Official Seal,' and all copies of all records and other instruments in the office of the commission, certified under the hand of its secretary with said seal affixed, shall be received in any court as *prima*

facie evidence of the original record or instrument." (L. 1919, c. 132 §1.)

§Sec. 3026. State Highway Superintendent. The commission shall appoint a state highway superintendent, with a salary to be fixed by the commission, payable in equal monthly installments. He shall be experienced and skilled in highway and bridge construction and maintenances; shall be allowed his actual and necessary traveling and other expenses incurred in the discharge of his official duties, and shall give his entire time to the duties of his office. Before entering upon the duties of his office he shall take the constitutional oath of office and give bond to the state of Wyoming in such amount and with such surety as may be approved by the commission, conditioned upon the faithful discharge of his duties and his accounting for all property, material and records in his control. Under the supervision of the commissioner he shall have complete charge of laying out and establishing highways upon which any portion of the state highway fund is to be expended, except on those highways constructed, improved or maintained in co-operation with the secretary of agriculture of the United States under section eight of the act of Congress or other federal act or acts specifically authorizing the use of federal funds to build roads within or partially within the national forests, and with the approval of the commission shall purchase all materials, supplies and equipment, including road-building machinery, materials, supplies and equipment, and shall employ such engineers, superintendents and employees with salaries to be approved by the commission, as may be necessary for the proper performance of the duties of the commission and the construction work undertaken by it." (L. 1919, c. 132 §2.)

"§3027. Work in Charge of Highway Superintendent. All road and bridge construction work any part of the cost of which is paid from the state highway fund, shall be per-

formed in accordance with the plans and specifications prepared by the state highway superintendent and approved by the commission, and shall be performed by or under contracts awarded by the commission, and the state highway superintendent shall have complete charge thereof, except on those highways constructed, improved or maintained in co-operation with the secretary of agriculture of the United States under section eight of the act of Congress or other federal act or acts specifically authorizing the use of federal funds to build roads within or paritally within the national forests. All improvements costing more than two thousand dollars shall be constructed upon contracts awarded to the lowest responsible bidder after public notice, but the commission may reject any or all bids, and re-advertise for bids; and the improvements costing less than two thousand dollars may be constructed by the commission upon force account or upon contract awarded upon public notice, as the commission may determine. The commission shall adopt general rules regulating the publication of notice to bidders and the awarding of contracts." (L. 1919, c. 132, §3.)

"§3028. Designation of State Highways. It shall be the duty of the state highway commission from time to time to designate public highways to be known as state highways, which may coincide in whole or in part with county roads theretofore legally established, and whenever such state highway shall be defined and designated by resolution duly entered in the minute record of the said commission, the title and interest of the respective counties, in so much of the road and right of way as shall be so designated shall pass to and vest in the state of Wyoming. With respect to so much of the rights of way of such state highways as shall not be acquired from the respective counties, the commission shall have the authority to acquire the same by purchase or gift, and if such necessary rights of

way cannot be so acquired, the commission shall have the authority to acquire the same by condemnation proceedings in the same manner as is provided by law for the condemnation of rights of way for railroad purposes, and upon the commencement of such condemnation proceedings shall have the authority to enter upon the proposed right of way and to commence the construction of the highway thereon; provided, that such condemnation proceedings may not after such entry be discontinued without the consent of the land owner." (L. 1919, c. 132, §4.)

"§3029. Work Shall Be Performed at Expense of State. Excepting as such work may be performed in co-operation with the secretary of agriculture of the United States as hereinafter provided, the construction and maintenance of all state highways, including all bridges and culverts thereon, shall be performed at the expense of the state and by and under the supervision of the commission and the state highway superintendent." L. 1919, c. 132, §5.)

"§3030. Co-operation With Counties. The commission shall have the power and authority to co-operate with the respective counties of the state in the construction of county roads, including bridges and culverts, other than state highways. All such co-operative work shall be performed under the immediate control and supervision of the commission and the state highway superintendent, and in accordance with plans and specifications prepared by the said superintendent, and shall not be commenced until the county shall have entered into an agreement with the commission to pay not less than one-half of the total cost to the state of such work and to pay the entire cost of maintaining the said highway thereafter." (L. 1919, c. 132, §6.)

"§3031. Contracts and Agreements with United States Government. The legislature of the state of Wyo-

ming hereby assents to the provisions of the act of Congress approved July 11, 1916, entitled 'An Act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes,' together with all acts and legislation amendatory thereto, or supplementary thereto or which shall grant or authorize aid for the construction, improvement, maintenance or repair of public roads or highways. The state highway commission is hereby authorized to enter into all contracts and agreements with the United States government relating to the construction and maintenance of roads under the provisions of the said act or acts of Congress to submit such scheme or program or construction or maintenance as may be required by the secretary of agriculture and to do all other things necessary fully to carry out the co-operation contemplated and provided for by the said act or acts, for the construction or improvement of highways under the said act, the good faith of the state is hereby pledged to make available funds sufficient to equal the sums apportioned to the state by or under the United States government during each of the years for which federal funds are appropriated by section 3 of said act and to maintain the roads so constructed with the aid of funds appropriated and to make adequate provisions for carrying out such maintenance. Co-operative agreements under the provisions of said act shall be entered into with the secretary of agriculture only by the commission, but may be for the construction or improvement of either a state highway or a county road. If the road to be improved under such co-operative agreement is a state highway, the state's share of the expense shall be borne entirely by the state; if the highway to be so improved or constructed under such co-operative agreement is not a state highway, the state's share of the cost of such work shall be divided between the state and the county upon such basis as the commission shall determine, and before such agreement is entered into

with the secretary of agriculture the county must furnish the right of way and shall have entered into an agreement with the commission whereby it shall agree to pay its share of such cost and to pay the cost of all subsequent maintenance work which shall be performed by and under the supervision of the state highway superintendent, and the county also shall pay into the state highway fund its share of the estimated cost of such construction." (L. 1919, c. 132, §7.)

"§3032. Plans and Specifications of Roads and Bridges. It shall be the duty of the state highway superintendent to compile all available information relative to the public roads and bridges within the state and for this purpose he may require the board of county commissioners of any county to cause to be prepared comprehensive maps to be filed in the department; he shall prepare standard plans and specifications for the construction of roads, culverts and bridges, and compile data relative to road and bridge materials and their values, and for this purpose may call upon the department of civil and irrigation engineering of the state university to make test of road and bridge materials without charge; and he shall furnish such plans, specifications and data to any board of county commissioners upon request, and shall advise with such boards with respect to highway construction and improvements not within the jurisdiction of the department and shall prepare special plans and specifications for such work when requested. He shall prepare plans and specifications for all bridges to be constructed by any county, city or town within the state, the cost of which shall exceed one thousand dollars, and no contract for the construction of such bridge shall be valid unless the plans and specifications therefor have been prepared or approved and the contract approved by the state highway superintendent and no payment upon any such contract shall be made until such

bridge shall have been examined and the payment approved by the said superintendent or his assistant." (L. 1919, c. 132, §8.)

"§3033. Annual Report. The state highway superintendent shall make an annual report to the commission of the transactions of the department, and on or before December first of each even numbered year, the commission shall make a report to the governor, and may cause the same to be printed, the cost to be paid from the state highway fund." (L. 1919, c. 132, §9.)

"§3034. State Highway Fund. There is hereby created a fund to be known as the state highway fund, to the credit of which the state treasurer, who is hereby designated as the state official to receive all amounts paid by the United States under the said act of Congress approved July 11, 1916, shall place all moneys heretofore received for said fund, all money hereafter received from the United States, under co-operate agreements as hereinbefore authorized, all money derived from taxes levied for such purpose or appropriated for said fund, all moneys received from the sale of state bonds for highway construction or improvement, all money received from the counties under co-operative agreements as hereinbefore authorized, and all other moneys received from donations or bequests which may be accepted by the commission on behalf of the state of Wyoming, or from any other source designated by law for that purpose. All moneys in said fund shall be available for the purposes of this chapter without further appropriation and no warrant shall be drawn thereon excepting on voucher approved by the state highway superintendent. It is hereby provided that seventy-five per cent of the amount of any bond issue hereafter issued by the state of Wyoming for the construction or improvement of state highways, after the payment of overhead expense, shall be apportioned to and spent in each county in the

proportion which the assessed valuation of each county by the last general assessment bears to the total assessment of the state." (L. 1919, c. 132, §10.)

"§3035. Appropriation. There is hereby appropriated to the state highway fund in the state treasury not otherwise appropriated, the sum of three hundred thousand dollars, which shall be made available upon the passage of this chapter, and the additional sum of three hundred thousand dollars which shall be available on March first, 1920. Balances remaining in said fund at the close of any annual or biennial period shall not revert to the general fund, but shall remain in the state highway fund and be subject to subsequent expenditure under this chapter. It is hereby provided that 75 per cent of the amount appropriated by the provisions of this chapter, after the payment of overhead expenses, shall be apportioned to and spent in each commissioner district in proportion to the assessed valuation of each district by the last general assessment." (L. 1919, c. 132, §11.)

"§3036. Shall Not Affect Contract in Existence. This chapter shall not affect any contract for the construction or improvement of highways now in existence or that may be made by any county prior to June 1, 1919." (L. 1919, c. 132, §12.)

"§3037. Overhead Expense. It is hereby provided that all expenses of the maintenances of office, offices, salary, salaries, engineering, surveying, field supervision and other overhead expenses in connection with the administration of this chapter, shall not exceed fifteen per cent of the total amount expended each year under the provisions of this chapter." (L. 1919, c. 132, §13.)

Wyo. Comp. Stat. 1920, *Chap.* 180.

"§154. General Duties. The attorney general shall

prosecute and defend all suits that may be instituted by or against the state of Wyoming, the prosecution and defense of which is not otherwise provided for by law, and he shall represent the state in all criminal cases in the supreme court, and shall defend all suits brought against the state officers in their official relations, except suits brought against them by the state. He shall be required to attend to the interests of the state in all suits, actions or claims in which the state is or may become interested in either the supreme court of the state, or in any of the United States courts. He shall be the legal adivisor of all elective and appointive state officers, and of the prosecuting attorneys of the several counties of the state, and shall, when requested, give written opinions upon questions submitted to him by such officers, and by either branch of the legislature, when in session."

Wyoming Compiled Statutes 1920, *Sec.* 154.

"§4893. Condemnation proceedings. The state, the counties and each municipal corporation shall have the power to purchase or acquire by condemnation, any real estate, including streets, alleys, or public highways, as sites for public buildings, or for any other necessary public purpose, and to take therein the fee simple absolute, which power of condemnation shall be exercised in the manner prescribed by law for the condemnation of real estate by railroad corporations. Proceedings in condemnation as aforesaid shall be conducted in the name of the state, county or municipal corporation, as the case may be, and by the attorney general, when for the state; the county attorney when for the county, and the municipal attorney, when for a municipal corporation. (L. 1890, c. 64; R. S. 1899, §2913; C. S. 1910, §3829.)"

Wyoming Compiled Statutes 1920, *Sec.* 4893.

"Sec. 6. Donations prohibited. Neither the state nor any county, city, township, town, school district, or any other political sub-division, shall loan or give its credit or make donations to or in aid of any individual, association or corporation, except for necessary support of the poor, nor subscribe to or become the owner of the capital stock of any association or corporation. The state shall not engage in any work of internal improvements unless authorized by a two-thirds vote of the people."

Const. Wyo. Art. XVI, *Sec.* 6.

"Sec. 9. State Highway construction. The provision of Sec. 6 of Article 16 of this constitution prohibiting the state from engaging in any work of internal improvement unless authorized by a two-thirds vote of the people shall not apply to or affect the construction or improvement of public roads and highways; but the legislature shall have power to provide for the construction and improvement of public roads and highways in whole or in part by the state, either directly or by extending aid to counties; and, notwithstanding said inhibition as to works of internal improvement, whenever grants of land or other property shall have been made to the state, especially dedicated by the grant to particular works of internal improvement, the state may carry on such particular works and shall devote thereto the avails of such grants, and may pledge or appropriate the revenues derived from such works in the aid of their completion."

Const. Wyo., Art. XVI, *Sec.* 9.